

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: ETHICON, INC.,
PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION

MDL No. 2327

THIS DOCUMENT RELATES TO:

Cases identified in Exhibit A attached hereto

ORDER

Pending before the court is the plaintiffs' Motion to Strike the Dr. Shelby F. Thames's Supplemental Reports or, in the Alternative, for Leave to File a *Daubert* Motion [ECF No. 2880]. Ethicon filed its Response [ECF No. 3018]. The plaintiffs' Motion requests exclusion of Dr. Thames's two supplemental reports but also requests the court to, in the alternative, allow them additional time to depose Dr. Thames. For the reasons detailed below, the plaintiffs' Motion is **GRANTED** as to the cases in Exhibit A.¹

I. Background

Pursuant to the Fourth Amended Wave 1 Docket Control Order [ECF No. 2314] ("Docket Control Order"), Ethicon was required to disclose its experts (and their opinions) on or before March 2, 2016. Docket Control Order 1. Discovery closed on

¹ On Exhibit A, I have marked through cases that are closed, on the inactive docket, not in Wave 1, could not be identified because of an error in the style or case number, or assigned to another District Judge.

April 1, 2016. *Id.* Further, all *Daubert* briefing was to be completed by May 16, 2016. *Id.* Ethicon timely disclosed Dr. Thames as an expert, along with his initial expert report. In the plaintiffs' *Daubert* motion on Dr. Thames, they questioned the reliability Dr. Thames's explant cleaning protocol. Mem. Supp. Mot. Exclude Ops. Dr. Thames 8–10 [ECF No. 2042]. It was this argument that prompted the design and execution of a new experiment to test the reliability of his cleaning protocol, to buttress the strength and reliability of his prior opinion. Mot. Strike Ex. B, at 1 [ECF No. 2880-1] ("First Supplemental Report"). Ethicon then served the First Supplemental Report with the preliminary conclusions of this experiment on August 8, 2016, and the Second Supplemental Report with the formal conclusions on September 28, 2016. *See id.* at 1; Mot. Strike Ex. C, at 1 [ECF No. 2880-2] ("Second Supplemental Report"). Both reports were served after the disclosure deadline, briefing deadline, and close of discovery.

The plaintiffs argue for exclusion under Rule 37(c) on the grounds that the supplemental reports were untimely served.² Mot. Strike 2–3. Ethicon responds that its delayed disclosures were justified and harmless. Ethicon focuses its attention on the five-factor test from *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 329 (4th Cir. 2011). *See generally* Resp.

II. Analysis

Pursuant to Rule 37(c) of the Federal Rules of Civil Procedure,

² The plaintiffs also informally argue that Dr. Thames's supplemental reports are not, in fact, "supplemental," but wholly new opinions subject to the March 2, 2016, deadline. Whether the reports are "supplemental" is of no consequence because the reports are untimely in either circumstance.

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

According to the Fourth Circuit, the appropriate factors to consider in determining whether to sanction a party under Rule 37(c) are the following:

(1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party's failure to name the witness before trial; and (5) the importance of the testimony.

Hoyle, 650 F.3d at 329.

I am simply unable to find that Ethicon's late disclosures of Dr. Thames's supplemental expert reports were substantially justified. Dr. Thames has a longstanding relationship with Ethicon, and Ethicon has provided no reason why this testing could not have been done prior to the disclosure of the initial expert report. Essentially, because the plaintiffs questioned the reliability of Dr. Thames's protocol, Ethicon decided to bolster its case by having Dr. Thames perform more testing of the testing. In essence, the supplemental expert reports are atonement for initial inadequacies or incomplete preparation. However, I must also evaluate whether the late disclosures were nevertheless harmless before I can determine whether sanctions are appropriate.

The plaintiffs' arguments support a finding of surprise. Although the plaintiff attacked the adequacy of Dr. Thames's cleaning protocol in their *Daubert* motion, they had no reason to suspect that an entirely new test would be performed to rebut their argument of reliability and then disclosed after the discovery deadline had closed. However, both parties have agreed to allow additional time for *Daubert*

briefing should the reports not be excluded. Thus, the ability to cure the surprise weighs in favor of permitting the reports.

I recognize that a trial date has not been set in this case, and I also recognize that any harm to the plaintiffs regarding this matter may be easily remedied by allowing them to have additional time to depose Dr. Thames. However, I must be particularly cognizant of the realities of multidistrict litigation and the unique problems an MDL judge faces. Specifically, when handling seven MDLs, each containing thousands of individual cases, case management becomes of utmost importance. *See In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006) (emphasizing the “enormous” task of an MDL court in “figur[ing] out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality”). I must define rules for discovery and then strictly adhere to those rules, with the purpose of ensuring that pretrial litigation flows as smoothly and efficiently as possible. *See id.* at 1232 (“[T]he district judge must establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial.”); *see also* Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”). In turn, counsel must collaborate with the court “in fashioning workable programmatic procedures” and cooperate with these procedures thereafter. *In re Phenylpropanolamine*, 460 F.3d at 1231–32. Pretrial orders—and the parties’ compliance with those orders and the deadlines set forth therein—“are

the engine that drives disposition on the merits.” *Id.* at 1232. A “willingness to resort to sanctions” in the event of noncompliance can ensure that the engine remains in tune, resulting in better administration of the vehicle of multidistrict litigation. *Id.*; *see also Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014) (“The MDL judge must be given ‘greater discretion’ to create and enforce deadlines in order to administrate the litigation effectively. This necessarily includes the power to dismiss cases where litigants do not follow the court’s orders.”).

The fourth factor, importance of the testimony, also weighs in favor of striking the reports. Both supplemental reports are twelve pages long, whereas the original report is 128 pages long. The testimony contained in the reports does not go to the heart of the case, but instead serves only to enforce the reliability of Dr. Thames’s cleaning protocol. I cannot find that the supplemental reports are crucial to either side’s case.

III. Conclusion

Accordingly, the plaintiffs’ Motion to Strike the Dr. Shelby F. Thames’s Supplemental Reports or, in the Alternative, for Leave to File a *Daubert* Motion [ECF No. 2880] is **GRANTED**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: March 28, 2017


JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

Exhibit A

Case No.	Case Style
2:11-cv-00809	Wilma Johnson v. Ethicon, et al.
2:12-cv-00256	Amy and Brent Holland v. Ethicon, et al.
2:12-cv-00258	Carrie Smith v. Ethicon, et al.
2:12-cv-00261	Mary F. Cone v. Ethicon, et al.
2:12-cv-00265	Doris Chappell Jackson v. Ethicon, et al.
2:12-cv-00276	Cathy and John Warlick v. Ethicon, et al.
2:12-cv-00277	Joy and Kevin Essman v. Ethicon, et al.
2:12-cv-00279	Susan Thaman v. Ethicon, et al.
2:12-cv-00286	Quillan R. and Thomas W. Garnett v. Ethicon, et al.
2:12-cv-00322	Linda B. Ryan v. Ethicon, et al.
2:12-cv-00335	Sandra Wolfe v. Ethicon, et al.
2:12-cv-00337	Kathleen Wolfe v. Ethicon, et al.
2:12-cv-00341	Helen M. Brown and Robert E. Ruttkay v. Ethicon, et al.
2:12-cv-00344	Rose and Jesus Gomez v. Ethicon, et al.
2:12-cv-00347	Deborah and Felipe Lozano v. Ethicon, et al.
2:12-cv-00351	Kathy Barton v. Ethicon, et al.
2:12-cv-00352	Charlotte Hargrove v. Ethicon, et al.
2:12-cv-00358	Amanda and Raymond Deleon v. Ethicon, et al.
2:12-cv-00368	Sharon and Michael Boggs v. Ethicon, et al.
2:12-cv-00369	Dawna Hankins v. Ethicon, et al.
2:12-cv-00376	Charlene Logan Taylor v. Ethicon, et al.
2:12-cv-00378	Tina and Kenneth Morrow v. Ethicon, et al.
2:12-cv-00379	Teri Key and Johnny Shively v. Ethicon, et al.
2:12-cv-00380	Terrie S. and Ralph R. Gregory v. Ethicon, et al.
2:12-cv-00381	Susan C. and Leonard Hayes v. Ethicon, et al.
2:12-cv-00387	Maru LuEllen and Thomas Lawrence Kilday v. Ethicon, et al.
2:12-cv-00389	Janice Renee Swaney v. Ethicon, et al.
2:12-cv-00397	Deborah A. Smith v. Ethicon, et al.
2:12-cv-00401	Carol Jean Dimock v. Ethicon, et al.
2:12-cv-00423	Pamela Free v. Ethicon, et al.
2:12-cv-00443	Holy and Jason Jones v. Ethicon, et al.
2:12-cv-00455	Pamela Gray Wheeler and Stan Wheeler v. Ethicon, et al.
2:12-cv-00468	Amelia R. and Ernest B. Gonzales v. Ethicon, et al.
2:12-cv-00469	Patricia Tyler v. Ethicon, et al.
2:12-cv-00470	Mary Jane and Daniel Olson v. Ethicon, et al.
2:12-cv-00476	Harriet Beach v. Ethicon, et al.
2:12-cv-00481	Miranda Patterson v. Ethicon, et al.
2:12-cv-00483	Carey Beth and David Cole v. Ethicon, et al.
2:12-cv-00485	Danni Laffoon v. Ethicon, et al.
2:12-cv-00486	Karen and Joel Forester v. Ethicon, et al.
2:12-cv-00489	Melissa and Charles Clayton v. Ethicon, et al.
2:12-cv-00490	Shirley and William Freeman v. Ethicon, et al.
2:12-cv-00491	Gwendolyn T. Young v. Ethicon, et al.
2:12-cv-00493	Nancy and Daniel Hooper v. Ethicon, et al.

Case No.	Case Style
2:12-cv-00494	Penelope Ann Link and Dan Richard Saurino v. Ethicon, et al.
2:12-cv-00495	Andrea Carol and Mark Thomas Chandlee v. Ethicon, et al.
2:12-cv-00496	Sonya M. and James R. Moreland v. Ethicon, et al.
2:12-cv-00497	Dina Sanders Bennett v. Ethicon, et al.
2:12-cv-00498	Myndal Johnson v. Ethicon, et al.
2:12-cv-00499	Kimberly Thomas v. Ethicon, et al.
2:12-cv-00500	Krystal and Gregory Teasley v. Ethicon, et al.
2:12-cv-00501	Jennifer and David Sikes v. Ethicon, et al.
2:12-cv-00504	Donna T. and James W. Pilgreen v. Ethicon, et al.
2:12-cv-00505	Mary and Kenneth Thurston v. Ethicon, et al.
2:12-cv-00506	Martha and Stuart Newman v. Ethicon, et al.
2:12-cv-00510	Charlene Miracle v. Ethicon, et al. Romona Greer Admin.
2:12-cv-00511	Nancy Williams v. Ethicon, et al.
2:12-cv-00516	Patricia Conti v. Ethicon, et al.
2:12-cv-00517	Joann Lehman v. Ethicon, et al.
2:12-cv-00539	Ann Louise Ruppel and Robert Dean Fuller v. Ethicon, et al.
2:12-cv-00540	Nancy and Kenneth Feidler v. Ethicon, et al.
2:12-cv-00547	Brenda and James Riddell v. Ethicon, et al.
2:12-cv-00548	Rhoda Schachtman v. Ethicon, et al.
2:12-cv-00554	Sharon and Gardner Carpenter v. Ethicon, et al.
2:12-cv-00555	Carolyn Sue Doyle v. Ethicon, et al.
2:12-cv-00567	Noemi and Cesar Padilla v. Ethicon, et al.
2:12-cv-00571	Mary Catherine Wise v. Ethicon, et al.
2:12-cv-00591	Beverly Kivel v. Ethicon, et al.
2:12-cv-00594	Frances Ann and Herman Cortez v. Ethicon, et al.
2:12-cv-00595	Mary and Thomas Hendrix v. Ethicon, et al.
2:12-cv-00601	Deanna Jean and Bennie G. Thomas v. Ethicon, et al.
2:12-cv-00609	Patricia O. Powell v. Ethicon, et al.
2:12-cv-00651	Robin Bridges v. Ethicon, et al.
2:12-cv-00652	Maria C. and Mark A. Stone v. Ethicon, et al.
2:12-cv-00654	Stacy and Kevin Shultis v. Ethicon, et al.
2:12-cv-00657	Judy G. Williams v. Ethicon, et al.
2:12-cv-00663	Ana Ruebel v. Ethicon, et al.
2:12-cv-00666	Donna and Leon Loustaunau v. Ethicon, et al.
2:12-cv-00669	Teresa and Ricky J. Stout v. Ethicon, et al.
2:12-cv-00679	Lisa and Henry Stevens v. Ethicon, et al.
2:12-cv-00683	Louise Grabowski v. Ethicon, et al.
2:12-cv-00736	Karen and Thomas Daniell v. Ethicon, et al.
2:12-cv-00737	Beth and Stuart Harter v. Ethicon, et al.
2:12-cv-00738	Sheri and Gary Scholl v. Ethicon, et al.
2:12-cv-00746	Margaret Kirkpatrick v. Ethicon, et al.
2:12-cv-00747	Karyn E. and Douglas E. Drake v. Ethicon, et al.
2:12-cv-00748	Myra abd Richard Byrd v. Ethicon, et al.
2:12-cv-00749	Jennifer D. and Willem C.J. Van Rensburg v. Ethicon, et al.

Case No.	Case Style
2:12-cv-00751	Raquel and Ernesto De La Torre v. Ethicon, et al.
2:12-cv-00755	Cheryl Lankston v. Ethicon, et al.
2:12-cv-00756	Dee and Michael Woolsey v. Ethicon, et al.
2:12-cv-00757	Barbara Jean and Keith Bridges v. Ethicon, et al.
2:12-cv-00759	Diane and Robert Matott v. Ethicon, et al.
2:12-cv-00760	Lois and Gerald Durham v. Ethicon, et al.
2:12-cv-00761	Barbara J. and Gary L. Ware v. Ethicon, et al. Vignos - Ware v. Ethicon, et al.
2:12-cv-00762	Janet D. Jones v. Ethicon, et al.
2:12-cv-00765	Rachel and Dwan Taylor v. Ethicon, et al.
2:12-cv-00766	Kimberly Garnto v. Ethicon, et al.
2:12-cv-00767	Rebecca and Charles Oehring v. Ethicon, et al.
2:12-cv-00768	Sandra and Christian LaBadie v. Ethicon, et al.
2:12-cv-00769	Kimberly T. Burnham v. Ethicon, et al.
2:12-cv-00772	Harmony Minniefield v. Ethicon, et al.
2:12-cv-00773	Tina and Keith Patterson v. Ethicon, et al.
2:12-cv-00779	Dee and Timothy McBrayer v. Ethicon, et al.
2:12-cv-00783	Wendy Hagans v. Ethicon, et al.
2:12-cv-00784	Schultz et al v. Ethicon, Inc. et al
2:12-cv-00786	Swint et al v. Ethicon, Inc et al
2:12-cv-00787	Joplin v. Ethicon, Inc et al
2:12-cv-00799	Quijano v. Ethicon, Inc. et al
2:12-cv-00800	Morrison et al v. Ethicon, Inc et al
2:12-cv-00806	Hill et al v. Ethicon, Inc. et al
2:12-cv-00807	Sweeney et al v. Ethicon, Inc. et al
2:12-cv-00811	Zoltowski et al v. Johnson & Johnson et al
2:12-cv-00821	Barr et al v. Ethicon, Inc. et al
2:12-cv-00828	Nix et al v. Ethicon, Inc. et al
2:12-cv-00829	Georgilakis et al v. Ethicon, Inc et al
2:12-cv-00830	Parrilla v. Ethicon, Inc. et al
2:12-cv-00842	Stubblefield v. Ethicon, Inc. et al
2:12-cv-00846	Raines et al v. Ethicon, Inc. et al
2:12-cv-00848	Fisk v. Ethicon, Inc et al
2:12-cv-00854	Ballard et al v. Ethicon, Inc et al
2:12-cv-00856	Massicot v. Ethicon, Inc. et al
2:12-cv-00859	Olmstead v. Ethicon, Inc. et al
2:12-cv-00860	Pelton v. Ethicon, Inc. et al
2:12-cv-00861	Smith et al v. Ethicon, Inc. et al
2:12-cv-00863	Gunter et al v. Ethicon, Inc
2:12-cv-00864	Nolan v. Ethicon, Inc. et al
2:12-cv-00867	Rock v. Ethicon et al
2:12-cv-00873	Walker et al v. Ethicon, Inc. et al
2:12-cv-00875	Holzerland et al v. Ethicon, Inc. et al
2:12-cv-00876	Hoy et al v. Ethicon, Inc. et al
2:12-cv-00878	Fox et al v. Johnson & Johnson, Inc. et al

Case No.	Case Style
2:12-cv-00880	Massey et al v. Ethicon, Inc. et al
2:12-cv-00883	Wroble et al v. Ethicon, Inc et al
2:12-cv-00886	Umberger et al v. Ethicon, Inc. et al
2:12-cv-00887	Kaiser et al v. Johnson & Johnson et al
2:12-cv-00888	Bruhn et al v. Ethicon, Inc et al
2:12-cv-00899	Barker et al v. Ethicon, Inc. et al
2:12-cv-00921	Wilson v. Ethicon, Inc et al
2:12-cv-00923	Atemnkeng et al v. Ethicon, Inc. et al
2:12-cv-00931	Collins v. Ethicon, Inc. et al
2:12-cv-00938	Kriz et al v. Ethicon, Inc. et al
2:12-cv-00939	Reyes et al v. Ethicon, Inc. et al
2:12-cv-00956	Justus v. Ethicon, Inc. et al
2:12-cv-00957	Funderburke v. Ethicon, Inc. et al
2:12-cv-00958	White et al v. Ethicon, Inc. et al
2:12-cv-00960	Amsden et al v. Ethicon, Inc. et al
2:12-cv-00961	Greene v. Ethicon, Inc. et al
2:12-cv-00967	Shepherd v. Ethicon, Inc. et al
2:12-cv-00995	Blake et al v. Ethicon, Inc. et al
2:12-cv-00997	Springer et al v. Ethicon, Inc. et al
2:12-cv-01004	Frye v. Ethicon, Inc. et al
2:12-cv-01011	Hankins et al v. Ethicon, Inc. et al
2:12-cv-01013	Lee et al v. Ethicon, Inc. et al
2:12-cv-01018	Gwinn et al v. Ethicon, Inc. et al
2:12-cv-01021	Ruiz v. Ethicon, Inc. et al
2:12-cv-01023	Burkhart v. Ethicon, Inc. et al
2:12-cv-01052	Babcock v. Ethicon, Inc. et al
2:12-cv-01053	Baughner v. Ethicon, Inc. et al
2:12-cv-01071	Schnering et al v. Ethicon, Inc. et al
2:12-cv-01081	Dixon v. Ethicon, Inc. et al
2:12-cv-01088	Wheeler et al v. Ethicon, Inc. et al
2:12-cv-01090	Wright v. Ethicon, Inc. et al
2:12-cv-01119	Rhynehart v. Ethicon, Inc. et al
2:12-cv-01121	Guinn v. Ethicon, Inc. et al
2:12-cv-01124	Bellito-Stanford et al v. Ethicon, Inc. et al
2:12-cv-01145	Constance Daino v. Ethicon, Inc. et al
2:12-cv-01146	Monica Freitas v. Ethicon, Inc. et al
2:12-cv-01148	Denise Sacchetti v. Ethicon, Inc. et al
2:12-cv-01149	Cindy Smith v. Ethicon, Inc. et al
2:12-cv-01150	Roberta Warmack v. Ethicon, Inc. et al
2:12-cv-01151	Laura Waynick v. Ethicon, Inc. et al
2:12-cv-01171	Patti Ann Phelps v. Ethicon, Inc. et al
2:12-cv-01198	Stacy Pangborn v. Ethicon, Inc. et al
2:12-cv-01199	Lisa Thompson v. Ethicon, Inc. et al
2:12-cv-01202	Diane Kropf v. Ethicon, Inc. et al

Case No.	Case Style
2:12-cv-01203	Joan Adams v. Ethicon, Inc. et al
2:12-cv-01206	Jeanie Holmes v. Ethicon, Inc. et al
2:12-cv-01215	Karen Bollinger v. Ethicon, Inc. et al
2:12-cv-01216	Christine Wiltgen v. Ethicon, Inc. et al
2:12-cv-01225	Ida Deanne Evans v. Ethicon, Inc. et al
2:12-cv-01262	Sandra Landes v. Ethicon, Inc. et al
2:12-cv-01267	Angela Coleman v. Ethicon, Inc. et al
2:12-cv-01273	Rebekah Barlett v. Ethicon, Inc. et al
2:12-cv-01274	Janice Colonna v. Ethicon, Inc. et al
2:12-cv-01275	Long v. Johnson & Johnson et al
2:12-cv-01277	Duncan v. Ethicon, Inc. et al
2:12-cv-01278	Nix v. Ethicon, Inc. et al
2:12-cv-01279	Bertoni et al v. Ethicon, Inc. et al
2:12-cv-01283	Cyrus v. Ethicon, Inc. et al
2:12-cv-01284	Floyd v. Ethicon, Inc. et al
2:12-cv-01285	Simpson et al v. Ethicon, Inc. et al
2:12-cv-01286	Wilson v. Ethicon, Inc. et al
2:12-cv-01293	Costello v. Ethicon, Inc. et al
2:12-cv-01294	Herrera-Nevarez v. Ethicon, Inc.
2:12-cv-01299	Destefano-Rasten et al v. Ethicon, Inc. et al
2:12-cv-01304	Irwin et al v. Ethicon, Inc. et al
2:12-cv-01305	Lager v. Ethicon, Inc. et al
2:12-cv-01311	Ridgley et al v. Ethicon, Inc. et al
2:12-cv-01318	Banks v. Johnson & Johnson, Inc. et al